IN THE HIGH COURT OF DELHI AT NEW DELHI

MAC.APP.No.704/2005

Oriental Insurance Company Ltd..... Appellant
! through: Mr.Ram N.Sharma, Advocate

VERSUS

$ Smt. Karuna Batra & Ors. ..... Respondents
^ through: Mr. S.P.Batra, Advocate with
Ms. Rakhi Dubey, Advocate
Mr. Manu Bansal, Advocate for
R – 5 & 6.

RESERVED ON: 15.05.2007

% DATE OF DECISION: 21.05.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**
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1. Appellant Insurance Company challenges the award dated 11.7.2005.

2. Deceased Lalit Batra died at a road accident on 4.10.2001 stated to be caused by rash and negligent driving by

driver of car bearing No. UMU-707. He was survived by his wife, two minor children and mother.

3. Dependents who are respondents No.1 to 4 filed a claim petition under Section 166 read with Section 140 of the Motor Vehicles Act 1988 claiming compensation on account of the death of the deceased.

4. As per the claimants the accident in question took place when deceased was traveling from Muzzafar Nagar towards Saharanpur in his Indica car bearing No.DL-3CR-0222. It was pleaded that the deceased was driving his car within permissible limits. That at the time of the accident i.e. 8.30 p.m. a tractor with a trailer bearing no.UST-6390 was plying ahead of the car of the deceased while car bearing No.UMU-707, Maruti make (800 CC) being driven by respondent No.6, Shri Pawan Kumar, was plying behind the car of the deceased. That as the driver of the tractor slowed down after giving an indication to said effect, the deceased de-accelerated his car after giving an indication to said effect. But, since respondent No.6 was driving his car in a rash and negligent manner, he failed to notice the slowing down of the car by the deceased and, therefore, rammed into the car of the deceased from the

rear. So great was the the impact that the car of the deceased, in turn, banged into the trailer of the tractor. The deceased suffered grievous injuries and died at the spot.

5. Respondent No.6 and his wife who owned the Maruti car bearing No.UMU-707 denied that the accident was caused due to the negligence of respondent No.6. They pleaded that the accident occurred due to the contributory negligence of the driver of the tractor who, according to them, had parked the tractor in the middle of the road without giving any indication. They pleaded that the deceased who was driving his car at a very high speed and did not see the stationary tractor trailer and, therefore, collided with the same. They pleaded that after the car of the deceased collided with the trailer of the tractor, car driven by respondent No.6 collided with the car driven by the deceased.

6. In order to prove their version, claimants being wife, children and mother of the deceased examined one Ravi Bhandari as PW-3 who claimed to be an eye witness to the accident.

7. Respondent No.6 and his wife examined respondent No.6 i.e. Pawan Kumar as RW-1.

8. Apart from the oral testimony of Pawan Kumar, they proved 8 photographs together with the negatives (Ex.RW-1/1 to Ex.RW-1/8) evidencing the position of the tractor trailer, car driven by the deceased and the car driven by the respondent No.6 in an accidental condition.

9. Holding that Ravi Bhandari was an eye witness to the accident, the Tribunal believed his version as deposed to by him pertaining to the accident to the effect that the car driven by respondent No.6 rammed into the car of the deceased and this triggered the accident i.e. the car of the deceased, in turn, rammed into the trailer behind the tractor. So holding , the Tribunal discussed the evidence pertaining to the income of the deceased. Noting that he was engaged in electronics business and with reference to his income tax returns Ex.PW-2/1-3 held that the income of the deceased was Rs.1,14,443/- per annum. Doubling the income on the presumption that the income would have arisen by the time the deceased would have stopped earning, noting that the deceased was aged 35 years, mean average annual income of the deceased was determined as Rs.1,79,664/-. Deducting 1/3rd as the presumed personal expenses of the deceased, loss of dependence determined is Rs.1,14,443/- per

annum. Applying the multiplier 17, loss of dependence determined is Rs.19,45,531/-. Rs.15,000/- has been awarded towards funeral expenses and Rs.50,000/- towards loss of consortium, total sum awarded is Rs.20,10,531/-.

10. Learned counsel for the appellant insurance company has challenged the finding of the Tribunal pertaining to the manner in which the accident took place as also in relation to the mean average income determined as also the multiplier adopted.

11. With reference to the photographs Ex.RW-1/1 to Ex.RW-1/8 and the testimony of PW-3 as also the testimony of RW-1, counsel urged that it is apparent that the deceased rammed into the trailer of the tractor and this was the cause of his death. No doubt, car driven by respondent No.6 did hit the car driven by the deceased, but said hit was not fatal. With reference to the income of the deceased, counsel urged that there was no evidence of future prospects and, therefore, submitted that the Tribunal could not have doubled the existing income. In relation to the multiplier adopted, counsel urged that keeping in view the age of the deceased being 42 years,

wrongly treated to be 35 years by the Tribunal, appropriate multiplier applicable was 10. Counsel further urged that even in respect of the existing income as per Ex.PW-2/1, income tax payable had to be deducted as said amount was not available to the family.

12. Before dealing with the main controversy i.e. the manner in which the accident took place, I may note that as per Ex.PW-2/1 to Ex.PW-2/3, being the income tax returns pertaining to the income of the deceased for the assessment years 2000-01, 2001-02 and 2002-03, date of birth stated is 3.5.1959. The accident took place on 4.10.2001. Thus, the deceased was aged 42 years and 5 months when he died and not 35 years as wrongly assumed by the Tribunal. The three returns further reveal that for the assessment year 2000-01, deceased paid tax in sum of Rs.7,000/- i.e. had a net income of approximately Rs.1,07,000/-. For the assessment year 2001-02, after deducting income tax paid, net income comes to approximately Rs.1,10,000/-. For the assessment year 2002-03, the professional income is Rs.39,141/-. I may note that the income shown in the last return is less for the reason, the deceased died in the month of October,2001. Thus, the

income was only for approximately 6 months.

13. As per PW-3, Ravi Bhandari, describing the accident, he stated as under :-

> "I do not remember the date, it was early October 2001. About 8-9 p.m. I was going from Muzzafar Nagar towards Saharanpur in my own car. The accident happened in front of me nearly. In my opposite direction one tractor trolley was coming followed by an Indica car which was followed by a Maruti car. The tractor trolley slowed down and indica also slowed down, thereafter the maruti car collided against the rear portion of indica car. Due to this the indica car got sandwiched between the tractor trolley and maruti car. I cannot tell the approx. speed of maruti car. After the accident I left from the spot.
>
> Subsequently I came to know that one of the occupants of Indica car, who had died was brother of one of my acquaintance. Police never recorded my statement nor I myself went to them."

14. I note that while discussing the testimony of Ravi Bhandari, even the learned Tribunal has commented upon the same with a pinch of salt as under:-

> "I am conscious that the eye witness account of the accident, as deposed by PW-3 lacks the necessary particulars. But it cannot be ignored that petitioners before me, the two widows and two minor children, could have no control over the eye witness. It is not uncommon that a stranger to an accident would not bother to remember the minute details of the accident including date and registration number of the vehicles."

15. Unfortunately, the Tribunal has been swayed by

emotions evidenced by the expression used by the Tribunal that it cannot ignore that he had before him two widows and two minor children.

16. A factor which has weighed with the Tribunal against the respondents is that they did not examine any eye witness. As regards the testimony of RW-1 i.e. Pawan Kumar, the driver of the Maruti car, learned Tribunal has brushed aside his testimony stating that he was an interested witness.

17. As regards the first reason i.e. not examining any eye witness, the Tribunal lost sight of the fact that the accident took place at about 8.30 P.M. i.e. in the night on a highway. Thus, there was every probability that there was no eye witness to the accident.

18. As regards the second reason, suffice would it be to note that the driver of the offending vehicle may be an interested party but that does not mean that his statement has to be ignored on said ground alone. The rule of prudence would require a stricter scrutiny of his testimony. If the testimony passes the strict scrutiny and there is other material to corroborate the same, I see no reason why the testimony of the driver of the offending vehicle be not

accepted and relied upon.

19. Men may lie, but circumstances do not lie.

20. Photographs, Ex.RW-1/1 to Ex.RW-1/8 throws light on the manner in which the accident in question took place.

21. Photographs Ex.RW-1/1 and Ex.RW-1/4 show that the left rear tyre of the tractor is punctured and that the tractor with the trailer attached behind is standing stationary in the middle of the road. The trailer is loaded with either stone grade or sand. Photograph Ex.RW-1/3 and Ex.RW-1/4 show that the Indica car being driven by the deceased has smashed into the rear of the trailer. The engine of the car is totally smashed and the rear end of the trailer is touching the wind screen of the car. Ex.RW-1/3 evidences that the body of the trailer is not parallel to the road. It has an upward incline viz-a-viz the road. Probably for said reason, the engine portion of the Indica car has protruded underneath the trailer. Ex.RW-1/6 and Ex.RW-1/7 show the accidental position of the Maruti car and the Indica car. The damage to the rear end of the Indica car and the front portion of the Maruti car show that the body of the two cars has been dented. The front bumper of the Maruti car and the rear bumper of the Indica car have not got

displaced, meaning thereby that the impact due to collision of the two cars is minimal. Further, the Maruti car has not hit the Indica car, head on i.e. with full impact of the Maruti car on to the Indica car for the reason only about 2 feet front portion of the Maruti car, towards its left side has hit the Indica car towards the right rear side of the Indica car spanning a distance of 2 feet rear portion of the Indica car.

22. The loaded tractor trailer is an indication of its weight. Thus, when the Indica car rammed into the stationary tractor trailer it is obvious that it hit a weighty object which was stationary. The Indica car was in momentum. The damage to the Indica car indicates that the principal cause of the death of the deceased was when he rammed his car into the tractor trailer. The photographs belie the testimony of PW-3 that he saw the tractor trailer slowing down and as a consequence the deceased also slowing down, but the driver of the Maruti car not doing so and hence responsible for the accident. The photographs evidencing the accidental position of the three vehicles support the version of RW-1, Sh. Pawan Kumar who was driving the Maruti car.

23. With a little understanding and application of the

laws of physics, the photographs Ex.RW-1/1 to Ex. RW-1/8 reveal a lot. Weight of an Indica car is slightly more than that of a Maruti 800 car. The accidental condition of the two cars belies that due to the Maruti car hitting the Indica car, the later was pushed into the rear side of the tractor trailer with such impact that the engine portion of the Indica car got totally smashed and damaged right up to the wind screen of the Indica car.

24. An analysis of the above photographs establishes that car of the deceased first collided with the stationary tractor and thereafter car bearing No.UMU-707 collided with the car of the deceased.

25. In these circumstances, I hold the driver of the tractor principally responsible for the accident for the reason, he had parked the tractor in the middle of the road without giving any indication. Secondary blame is that of the deceased who failed to notice the stationary tractor trailer on the road and hit the same with great momentum. Least blame worthy conduct is that of the driver of the Maruti Car.

26. It is not a case of composite negligence. It is a case of contributory negligence. I apportion the blame 50% on the

driver of the tractor trailer, 30% on the deceased and 20% on RW-1.

27. On the issue of compensation, I note that Tribunal has awarded compensation in sum of Rs.20,10,531/- to the dependents of the deceased.

28. Deceased was survived by his wife, two minor children and mother.

29. I note that deceased was a businessman. He was running a business of manufacturing and trading electronic goods under the name and style of “Batbro Electronics”. Noting income tax return Ex.PW-2/1, Tribunal has determined income of the deceased at the time of the accident at Rs.1,14,443/- per annum. Giving benefit of futuristic income, Tribunal has taken mean average income of the deceased as Rs.1,71,664/-. Deducting 1/3rd towards the personal spending of the deceased, loss of dependence has been determined by the Tribunal at Rs.1,14,443/- per annum.

30. Applying the multiplier 17, Tribunal has determined loss of dependence and awarding conventional damages, total award is in sum of Rs.20,10,531/-.

31. For the reasons noted in para 12 above, finding by

the Tribunal that the deceased was aged 35 years is incorrect. The deceased was aged 42 years and 5 months.

32. Learned counsel for the appellant insurance company submitted that there was no evidence of future prospects and therefore, Tribunal could not have doubled the existing income of the deceased. In support of his contention, learned counsel relied upon judgment of the Supreme Court in the decision reported as *Bijoy Kumar Dugar Vs. Bidyadhar Dutta & Ors.* AIR 2006 SC 1255.

33. In the para 7 of the aforenoted decision, Supreme Court has observed as under:-

> "7. The mere assertion of the claimants that the deceased would have earned more than Rs.8000/- to Rs.10,000/- per month in the span of his life time cannot be accepted as legitimate income unless all the relevant facts are proved by leading cogent and reliable evidence before the MACT. Claimants had to prove that the deceased was in a trade where he would have earned more from time to time or that he had special merits or qualifications or opportunities which would have led to an improvement in his income. There was no evidence produced on record by the claimants regarding future prospects of increase of income in the course of employment or business or profession. Thus, the MACT had awarded just and reasonable compensation to the claimants."

34. Therefore, in order to get benefit of futuristic income, claimants are required to place on record the evidence

establishing the future income of the deceased.

35. In the instant case, in relation to income of the deceased, 3 income tax returns i.e. Ex.PW-2/1 to Ex.PW-2/3 have been filed. Income tax return Ex.PW-2/1 shows that deceased had a gross income of Rs.1,14,443/- in the assessment year 2000-01. Income tax return Ex.PW-2/2 shows that deceased had a gross income of Rs.1,24,564/- in the assessment year 2001-02. For the assessment year 2002-03, the income of the deceased is Rs.39,141/- as per income tax return Ex.PW-2/3. I may note that the income shown in the last return is less for the reason, the deceased died in the month of October. The aforenoted returns establishes that income of the deceased was gradually increasing. Deceased was aged 42 years as on the date of the accident. It could reasonably be expected that had he been alive, he would have worked till the age of 60 years. I therefore concur with learned Tribunal that salary of the deceased would have doubled by the time he would have left gainful employment.

36. After taking mean average income of the deceased and deducting 1/3rd for the personal spending of the deceased, Tribunal has determined loss of dependence at

Rs.1,14,443/- p.a. I adopt the said figure as the loss of dependence. However, Tribunal has erred in applying multiplier of 17.

37. Noting that since deceased was aged 42 years at the time of the accident, I consider multiplier of 11 as appropriate. In so holding, I note following judgments of the Supreme Court :-

> "1. *Tamilnadu State Road Transport Corp. Ltd. Vs. S.Rajapriya & Ors.* AIR 2005 SC 2985: Supreme Court applied a multiplier of 12 in case of deceased aged 38 years.
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> 2. *The Managing Director, TNSTC Ltd. Vs. K.I.BIndu & Ors.* 2006 ACJ 423: Supreme Court applied a multiplier of 13 in case of a deceased aged 34 years.
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> 3. *U.P.State Road Transport Co. Vs. Krishna Bala & Ors.* 2006 ACJ. 2114: Supreme Court applied a multiplier of 13 in case of deceased aged 36 years.
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> 4. *The Municipal Corporation of Greater Bombay Vs. Sh. Laxman Iyer & Anr.* 2004 ACJ 53: Supreme Court applied a multiplier of 12 noting the age of the parents who were aged 47 years and 43 years respectively, Deceased was aged 18 years.
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> 5. *New India Assurance Co. Ltd. Vs. Kalpana & Ors.* 2007 (2) SCALE 227: Supreme Court applied a multiplier of 13 in case of a deceased aged 33 years.
>
> 6. *The Managing Director, TNSTC Vs. Sripriya & Ors.* Civil Appeal No.1200/2007 decided on 8.3.2007: Supreme Court applied a multiplier of 12 in case of a deceased aged 37 years."

38. On the multiplier of 11 and maintaining the non-pecuniary loses as worked out by the Tribunal, the total compensation comes to Rs.13,23,873/-.

39. A fact needs to be noted. For unexplainable reasons the claimants, in spite of repeated opportunities granted by the Tribunal, failed to implead the driver, owner and the insurer of the tractor as a party in the claim petition. Unfortunately, I cannot pass any award against the said three parties.

40. As respondent no.1 has been held blame worthy only to the extent of 20%, said respondent, his wife who owned the Maruti Car and the insurance company are thus jointly and severally liable to the extent of only 20%. Thus, I hold that they are liable to pay to the claimants only Rs.2,64,774/-. The said amount would be payable from the date of the claim petition till it was received by the claimants at the rate of interest awarded by the Tribunal.

41. Vide interim order dated 24.8.2005, appellant was directed to deposit 50% of the sum awarded which was permitted to be withdrawn by the claimants subject to furnishing security. Since amount has become refundable to the appellant i.e. the insurance company, I hold that the

insurance company would be entitled to seek restitution by moving an application before the Tribunal.

42. Appeal stands disposed of in terms of para 40 above.

43. No costs.

May 21, 2007
MM

PRADEEP NANDRAJOG
JUDGE